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Labor Legislation

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LABOR LEGISLATION

On August 27, 1963, the Railroad Labor Dispute Arbitration Act[1] was signed into law by the President of the United States. This enactment was preceded by the passage on June 10th of the Equal Pay Act of 1963.[2] Thus, the 88th Congress during its 1st session contributed two major statutory additions to the existing body of federal labor law.

RAILROAD ARBITRATION ACT

Faced with the threat of a national rail strike which would affect up to ninety-four percent of the nation's rail mileage, Congress, in response to a special message of the President of the United States,[3] enacted the Railroad Labor Dispute Arbitration Act.[4]

This enactment was precipitated by the inability of administrative and judicial bodies to bring about, through the use of existing federal mediation devices, a settlement of this dispute satisfactory to both parties.

On August 8, 1962, a United States District Court dismissed a suit brought by the Brotherhood of Locomotive Engineers to enjoin the implementation of new work rules by the Baltimore & Ohio Railroad.[5] The dismissal of this suit was affirmed by the United States Supreme Court[6] which held that there was nothing that could be done within the present federal statutory framework to prevent the implementation of the work rules other than the President's creation of an emergency board pursuant to Section 10 of the Railway Labor Act[7] (hereinafter "RLA"). Subsequently the President named an emergency board which proved successful only in that it produced a statutory cease-fire during the deliberation of the board (and thirty days thereafter), for at the end of that period the parties were still holding fast to their original positions. The history of this dispute, marked by the irreconcilable positions of the parties and by the apparent total inability of the executive and judicial branches to induce them to reach even a minimal accord, foreshadowed the inevitability of congressional intervention.

The Act, which relies on the specific arbitration procedures of the RLA,[8] provides for binding arbitration of the current work rules dispute[9] between

[1] 77 Stat. 129 (1963). The Act will hereinafter be cited as the Railroad Arbitration Act.

[2] 77 Stat. 56 (1963).

[3] 109 Cong. Rec. 12397 (daily ed. July 22, 1963).

[4] Supra note 1.

[5] See Brotherhood of Locomotive Eng'rs v. Baltimore & O.R.R., 310 F.2d 503 (7th Cir. 1962).

[6] Brotherhood of Locomotive Eng'rs v. Baltimore & O.R.R., 372 U.S. 284 (1963).

[7] 44 Stat. 586 (1926), 45 U.S.C. 160 (1958).

[8] 44 Stat. 577 (1926), 45 U.S.C. 157 (1958); 44 Stat. 582 (1926), 45 U.S.C. 158 (1958); 44 Stat. 585 (1926), 45 U.S.C. 159 (1958).

[9] Briefly, the existing work rules provide that there shall be two men in the cabs of diesel freight and yard locomotives and that road and yard crews consist of one conductor and two brakemen. The carriers demand the right to remove all firemen from locomotives (except passenger locomotives) and to have the exclusive right to determine the makeup of all crews. The brotherhoods, on the other hand, argue that firemen are essential for safety purposes and for the relief of engineers and demand a minimum road and yard crew of one conductor and two brakemen.

the carriers[10] and the railroad brotherhoods.[11] The arbitration board[12] is empowered to render within ninety days of enactment (of the Act) a binding award as to the use of firemen on other than steam power locomotives and the makeup of road and yard crews.[13] These "primary issues" represent portions of the carriers' notices of November 2, 1959,[14] and the brotherhoods' notices of September 7, 1960,[15] which set forth the areas of dispute.

The Act further provides that the parties shall immediately resume collective bargaining with respect to all "secondary issues"[16] set forth in the notices.[17] However, in contrast to the original Senate joint resolution,[18] the final version of the Act does not compel arbitration of these "secondary issues" in the event of deadlock in collective bargaining. This alteration of the joint resolution means that "only those issues upon which the parties themselves had neared agreement on the need for arbitration"[19] will be referred to the board.[20]

Section 1 of the Act forbids any change in rates of pay, rules or working conditions except by agreement of the parties and prohibits any strikes or lockouts.[21] The Act further provides that the arbitration award shall be filed in the United States District Court for the District of Columbia,[22] that such award is to be in effect for not more than two years[23] and that the Act itself shall expire, except as to the duration of the arbitration award, one hundred and eighty days after the date of its enactment.[24]

This is the second time in our nation's history that Congress has acted to resolve a labor-management controversy and on both occasions the

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10 This includes virtually all of the nation's railroads.

11 This includes the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors and Brakemen, the Brotherhood of Railroad Trainmen and the Switcher's Union of North America.

12 The Arbitration Board is made up of two members selected by the railroad brotherhoods, two members selected by the carriers and three (neutral) members picked by the other four, with a provision for Presidential selection in the event of delay or deadlock. Railroad Arbitration Act § 2, 77 Stat. 129 (1963).

13 Railroad Arbitration Act § 3, 77 Stat. 129 (1963).

14 Those portions of the carriers' notices of November 2, 1959, which are to be submitted to arbitration are entitled, "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews." Railroad Arbitration Act § 3, 77 Stat. 129 (1963).

15 That portion of the brotherhoods' notices of September 7, 1960, which is to be submitted to arbitration is entitled, "Minimum Safe Crew Consist." Railroad Arbitration Act § 3, 77 Stat. 129 (1963).

16 The "secondary issues" include the carriers' proposals on interdivisional runs, combining yard and road crews and manning of self-propelled vehicles. 54 Lab. Rel. Rep. 2 (Sept. 2, 1963).

17 Railroad Arbitration Act § 6, 77 Stat. 129 (1963).

18 S.J. Res. 102, 88th Cong., 1st Sess. § 6(b) (1963).

19 S. Rep. No. 459, 88th Cong., 1st Sess. 12 (1963).

20 Under the Act, the board's award must be handed down within one hundred and twenty days after enactment, but will not go into effect until sixty days thereafter. Railroad Arbitration Act § 5, 77 Stat. 129 (1963).

21 Railroad Arbitration Act § 1, 77 Stat. 129 (1963).

22 Railroad Arbitration Act § 4, 77 Stat. 129 (1963).

23 Ibid.

24 Railroad Arbitration Act § 8, 77 Stat. 129 (1963).

dispute has involved railroads and their employees. The Supreme Court, in passing on the constitutionality of a 1916 congressional act, which created an eight hour day for railroad workers who were threatening a nationwide strike stated:

> . . . there would seem to be no ground for disputing the power . . . to exert the legislative will for the purpose of settling the dispute and bind both parties to the duty of acceptance and compliance to the end that no individual dispute or difference might bring ruin to the vast interests concerned in the movement of interstate commerce . . . .[25]

Despite the fact that this arbitration proceeding was the subject of a specific congressional enactment, there remains grave doubts as to its long range effectiveness as a solution to this railroad labor controversy. The removal from the original version of the Act of the requirement that any "secondary issues" be submitted to arbitration upon breakdown in collective bargaining[26] could perhaps be a fatal defect in the enactment. This amendment was intended by its sponsors to narrow the element of compulsion to its smallest possible area. Indeed, it was intended to limit the jurisdiction of the board to only those areas of the dispute which the parties had tentatively agreed to arbitrate, and thereby to alter the approach of the legislation from that of "compulsory" to that of "voluntary" arbitration.[27] Consequently, there is a real possibility that only those specifically arbitrated matters will be resolved and that the "secondary issues" will remain unsettled and act as stop-gaps to any permanent solution of the controversy. It would nonetheless appear that, despite further dispute between the parties as to those "secondary issues," the very fact of congressional action will serve as a constant reminder of the necessity of cooperation and reasonableness in all future collective bargaining negotiations.

Although it would appear that the Act itself is free from any constitutional difficulties in view of the Supreme Court's position towards solutions to such extraordinary labor controversies,[28] there remains a quite legitimate fear that Congress has unleashed a precedent which threatens the very existence of free collective bargaining.[29] These fears have been heightened by the efforts of certain members of the shipping industry to effect the enactment of a compulsory arbitration law for the settlement of maritime disputes.[30]

The hostility with which the principle of compulsory arbitration has

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[25] Wilson v. New, 243 U.S. 332, 350 (1917). The Court interpreted 39 Stat. 721 (1916).

[26] Supra note 18.

[27] 54 Lab. Rel. Rep. 40 (Sept. 2, 1963).

[28] See the Court's position in Wilson v. New, supra note 25 and also the Court's position in United Steelworkers of America v. United States, 361 U.S. 39, 43 (1959), in which the Court stated that there exist ". . . certain rights in the public to have unimpeded for a time production in industries vital to the national health or safety."

[29] See remarks of Representative Roybal entitled "Compulsory Arbitration a Dangerous Precedent" in 109 Cong. Rec. A5721 (daily ed. Sept. 10, 1963).

[30] N.Y. Times, April 4, 1963, p. 94, col. 1.

heretofore been met by Congress can be readily gleaned from a comment by Senator Taft in discussing whether a provision for compulsory arbitration should be incorporated into the Taft-Hartley Act. He stated: "We do not feel that we should put into the law, as a part of the collective-bargaining machinery, an ultimate resort to *compulsory arbitration*, or to seizure, or to any other action. *We feel that it would interfere with the whole process of collective bargaining.*"[31] (Emphasis supplied.) Indeed, the only substantial deviation by Congress from this anti-compulsory arbitration policy has occurred as a result of labor-management disputes in the railroad industry.[32]

The treatise writers' viewpoint on this subject is vigorously summarized by Professor Charles Gregory of the University of Virginia, who, by way of defense of arbitration in general, indicated his distaste for compulsory arbitration by commenting that:

> Neither employers nor unions relished a system under which some outsider would establish the terms and conditions under which they would have to live with each other. Compulsory arbitration had an odious connotation, and they preferred, even at the cost of strikes and lockouts, to bargain these things out between themselves . . . . Unless Congress should provide for it—an inconceivable contingency—there can be no compulsion to settle bargaining disputes through arbitration and to abandon recourse to the strike and the lockout.[33]

Cognizant of the antagonisms which any compulsory arbitration law will draw from so many quarters and of its potential as precedent in any future dispute (as previously noted), Congress modified the original Presidential draft of the Act by excluding the "secondary issues" from the Board's purview and transferring the arbitration proceeding itself from the Interstate Commerce Commission to a temporary board of private individuals. This latter modification was thought necessary to discourage the establishment of a permanent compulsory arbitration board.[34] These two changes in the original version of the Act will no doubt go a long way towards discouraging the use of this particular solution in any future labor controversy.

In the final analysis, however, it appears to be quite clear that the significance of this statute as precedent in the event of any future labor

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[31] 93 Cong. Rec. 3835-36 (1947) (remarks of Senator Taft).

[32] See Brotherhood of Locomotive Eng'rs v. Louisville & N.R.R., 373 U.S. 33 (1963) in which the Court affirmed the enjoining of a threatened rail strike involving a "time lost" dispute by invoking the provisions of Section 153 of the Railway Labor Act, 44 Stat. 1185, 1189 (1934), which provides a compulsory substitute for self-help when minor disputes occur in the railroad industry.

[33] Gregory, Labor and the Law, 477-78 (2d ed. 1961). This viewpoint is also held by Frances Kellor, who, while Vice-President of the American Arbitration Ass'n, wrote:

> [A]rbitration remains the voluntary agreement of . . . persons to submit their differences to judges of their own choice and to bind themselves in advance, to accept the decision of judges, so chosen, as final and binding. This natural right of self-regulation is a precious possession of a democratic society . . . .

Kellor, American Arbitration, 4 (1948).

[34] Supra note 19.

dispute, even of a national nature, will be severely restrained by due process limitations. The Supreme Court's traditional distaste for compulsory arbitration as a solution to labor disputes was succinctly stated by Mr. Chief Justice Taft in a 1923 decision which declared unconstitutional a state compulsory arbitration statute invoked during a dispute in the meat packing industry.[35] Speaking for the majority of the Court he stated:

> It is not too much to say that the ruling in *Wilson v. New*[36] went to the borderline, although it concerned an interstate common carrier in the presence of a nationwide emergency and the possibility of great disaster. Certainly there is nothing to justify extending the drastic regulation sustained in that exceptional case to the one before us.[37]

Equal Pay Act of 1963

On June 10, 1963, the Equal Pay Act of 1963[38] was signed into law. This act, which amends the Fair Labor Standards Act[39] (hereinafter "the FLSA"), prohibits all employers covered by the FLSA from discriminating between employees on the basis of sex by paying lower wages to women employees for work which is equivalent to that carried on by their male fellow workers.

The underlying purpose of the Act is to insure that "employees doing equal work should be paid equal wages, regardless of sex."[40] Thus, one more fair labor standard has been added to the FLSA which previously included the following requirements: (1) minimum wage,[41] (2) compulsory overtime pay rate for excessive hours of employment (over forty hours per week),[42] (3) elimination of working conditions that adversely affect the health or endanger the safety of child employees.[43] A comparison of the United States Supreme Court's interpretation of the legislative purpose behind the prior fair labor standard enactments and the congressional preamble to the present Act indicates that this Act is in substantial accord with a single congressional policy running throughout all of these previous enactments. In 1941 the Court stated with reference to the FLSA that:

> Its purpose as we judicially know . . . is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being . . . .[44]

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[35] Wolff Packing Co. v. Kansas Court of Industrial Relations, 262 U.S. 522 (1923).
[36] Supra note 25.
[37] Supra note 35, at 544.
[38] Supra note 2.
[39] 52 Stat. 1060 (1938), 29 U.S.C. 201 (1958).
[40] H.R. Rep. No. 309, 88th Cong., 1st Sess. 2 (1963).
[41] FLSA § 6, 52 Stat. 1062 (1938), 29 U.S.C. 206 (1958).
[42] FLSA § 7, 52 Stat. 1063 (1938), 29 U.S.C. 207 (1958).
[43] FLSA §§ 3(L) and 12, 52 Stat. 1060 (1938), 29 U.S.C. 203(L); 52 Stat. 1067 (1938), 29 U.S.C. 212 (1958).
[44] United States v. Darby, 312 U.S. 100, 109, amended, 312 U.S. 657 (1941).

Four years later in the case of *A. H. Phillips, Inc. v. Walling*,[45] the Court stated that the FLSA was designed to insure that both men and women receive fair and adequate compensation for their labor. Similarly the 1963 Act's "Declaration of Purpose" states that "The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex depresses wages and living standards for employees necessary for their health and efficiency."[46] This statement of purpose indicates that the Equal Pay Act of 1963 was designed to utilize the framework of the FLSA to bring about a rounding out of a long-standing federal policy in favor of proper working conditions and adequate remuneration for the laboring classes engaged in interstate commerce enterprises.

In order to come within the provisions of the Act the female's job must require "equal skill, effort, and responsibility"[47] and be performed under working conditions similar to those under which employees of the opposite sex are engaged. Exceptions are provided for unequal payment made pursuant to seniority or merit systems, piecework and any "differential based on any other factor other than sex."[48] The Act also includes a specific prohibition against any attempt by a "labor organization"[49] to induce such discrimination.[50]

The Act in its final version represents a substantial variation from the original Presidential draft, the overall effect of which is to substantially lessen its coverage and influence. Whereas the initially proposed measure gave the Secretary of Labor broad regulation and rule making authority,[51] the final version deletes this power leaving the Secretary with nothing more than the role of issuing opinions and interpretative bulletins provided by the FLSA[52] (this is considered by some, however, to be quite a substantial prerogative).[53] The most significant alteration of the original bill, however, was the congressional decision to incorporate the Act into the FLSA, rather than enact an independent statute.[54] This alteration restricts the Act's coverage to those areas of employment covered by the FLSA and thus excludes the employees of hotels,[55] laundries,[56] and restaurants[57] where the number of women employees is substantial. Also excluded are executive and man-

[45] 324 U.S. 490 (1945).

[46] Equal Pay Act § 2(a)(1), 77 Stat. 56 (1963).

[47] Equal Pay Act § 3(d)(1), 77 Stat. 56 (1963).

[48] Ibid.

[49] Equal Pay Act § 3(d)(4), 77 Stat. 56 (1963).

[50] Equal Pay Act § 3(d)(2), 77 Stat. 56 (1963). With respect to labor organizations it is worthy of note that although the Act is to become effective one year after the date of its enactment there is included a special provision allowing for a grace period of up to one year for those "employees covered by a . . . collective bargaining agreement." Equal Pay Act § 4, 77 Stat. 56 (1963).

[51] Supra note 40.

[52] Supra note 40, at 3.

[53] Supra note 40, at 9 (minority view of Representative Martin).

[54] Supra note 40, at 2.

[55] FLSA § 13(a)(ii), 52 Stat. 1067 (1938), 29 U.S.C. 213(a)(2) (1958).

[56] FLSA § 13(a)(3), 52 Stat. 1067 (1938), 29 U.S.C. 213(a)(3) (1958).

[57] Supra note 55.

agerial employees,[58] upon whom such an enactment would have considerable effect albeit it would meet with considerable difficulty in application. Exempt also from the Act's coverage are telephone,[59] agricultural,[60] and local transit workers.[61]

The official reason for the latter amendment was two-fold: to eliminate the necessity for creating a new bureaucratic structure for enforcement of a separate statute[62] and to facilitate compliance by the affected parties by virtue of industry and labor's knowledge of existing FLSA provisions.[63] Nonetheless, it would appear that the underlying motivation for such an amendment was to pacify the more conservative members of Congress who would object to an enlargement of federal jurisdiction beyond the FLSA limits.[64]

Legislation of a similar nature has previously been enacted in some twenty-two states,[65] but has been viewed by the proponents of federal legislation as largely ineffective for various reasons. They point to the fact that too many of these laws leave out large numbers of workers;[66] that there is no thorough enforcement of these statutes;[67] and that fewer than one-half of the states have enacted such laws.[68]

It seems quite probable, however, that this enactment will have the ironic effect of working to the disadvantage of the very group which it was designed to assist.[69] This prognosis was uttered by Congressman Paul Findley, who, claiming that "the cost of employing women is higher than the cost of employing men,"[70] proposed an amendment which failed to receive congressional approval. This amendment would have allowed an employer to show facts indicating "ascertainable and specific added costs resulting

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58 FLSA § 13(a)(1), 52 Stat. 1067 (1938), 29 U.S.C. 213(a)(1) (1958).

59 FLSA § 11, 52 Stat. 1067 (1938), 29 U.S.C. 213(a)(11) (1958).

60 FLSA § 13(a)(6), 52 Stat. 1067 (1938), 29 U.S.C. 213(a)(6) (1958).

61 FLSA § 13(a)(9), 52 Stat. 1067 (1938), 29 U.S.C. 213(a)(9) (1958).

62 S. Rep. No. 176, 88th Cong., 1st Sess. 3 (1963).

63 Ibid.

64 [T]here will be no change or expansion of present labor standards application.

Those employers who are presently subject to the Fair Labor Standards Act will be the only ones subject to the new provisions on equal pay.

Under past legislation, coverage would have been based on employers in commerce having 25 or more employees within a single place of employment.

Thus, a large number of employers, who are presently exempt from Fair Labor Standards Act coverage, would have been brought under such a bill.

109 Cong. Rec. 8413 (daily ed. May 17, 1963) (remarks of Senator McNamara, sponsor of the Act).

65 Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Illinois, Maine, Massachusetts, Michigan, Missouri, Montana, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington, Wisconsin, and Wyoming.

66 109 Cong. Rec. 8693 (daily ed. May 23, 1963) (remarks of Representative Sickles).

67 Ibid.

68 109 Cong. Rec. 8415 (daily ed. May 17, 1963) (remarks of Senator Randolph).

69 Wall Street Journal, June 11, 1963, p. 10, col. 1.

70 109 Cong. Rec. 8705 (daily ed. May 23, 1963) (remarks of Representative Findley).

from employment of the opposite sex"[71] and thereby permit him to pay a justifiably lower wage to his female employees. Because an employer who utilizes female labor incurs this additional cost, coupled with his inability to set-off this expense by paying these employees lower wages, will result in many employers being financially prohibited from hiring, or continuing to employ women workers. Thus, there looms the distinct possibility that this well-meaning piece of social legislation, while providing the majority of working women with long awaited economic equality, will have the ironic effect of eliminating from the labor market many members of the fair sex.

THOMAS P. KENNEDY

SECURED TRANSACTIONS

California recently enacted two amendments to its Retail Installment Sales Act[1] (the Unruh Act) redefining the rights and obligations of a defaulting conditional buyer. The amendments concern such buyer's liability for the expenses of retaking and storage when the seller has repossessed the goods prior to a resale and the buyer's subsequent liability for any deficiency remaining on the contract after the resale. These amendments differ markedly from the common law, the pre-amendment California Retail Installment Sales Act, the Uniform Conditional Sales Act, and the Uniform Commercial Code.

The amendments are part of a growing field of legislation designed to protect the buyer under an unwise installment or conditional sales contract.[2] As a result of the increased popularity of this type of financing arrangement, the law in this area is undergoing a period of legislative expansion.[3] Underlying these developments is the basic policy conflict between the desire to protect the buyer-consumer to equalize his bargaining position with that of the seller-lender and the reluctance to stifle business through over-regulation of conditional sales financing.[4] This note will trace briefly the development

[71] 109 Cong. Rec. 8705 (daily ed. May 23, 1963).

[1] Cal. Civil Code § 1812.2 — 1812.5 (Supp. 1962), as amended by Cal. Laws 1963, ch. 1952.

[2] It is helpful to outline the nature of the conditional sale as a security device regulating the rights of the parties to the agreement. The conditional buyer buys under a deferred payment arrangement. If the buyer defaults, the seller has the power to realize on his security interest in the buyer's obligation to pay. Ownership, title, and the attendant risks as to the goods are divided between the parties. The chattel mortgage, on the other hand, is not limited to the sale of goods, but covers any situation in which money is lent against tangible security. It is essentially a conveyance from a debtor to his creditor of a security interest in the property subject to the mortgage, which binds the debtor until he has fully paid his debt. The chattel mortgagee, unlike the conditional seller, must record to protect his security interest.

[3] Hogan, A Survey of State Retail Instalment Sales Legislation, 44 Corn. L.Q. 38 (1958).

[4] These conflicting policy considerations have been discussed by many of the commentators. See Hogan, supra note 3; Project: Legislative Regulation of Retail Installment Financing, 7 U.C.L.A. L. Rev. 623 (1960); Project: California Chattel Security and Article 9 of the UCC, 8 U.C.L.A. L. Rev. 813 (1961).